Supreme Court, U.S.
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No. 09-755

IN THE

Supreme Court of the United States

LOUIS DALE MARCANTEL, Individually and in his Official Capacity as Chief of Police of the Village of Turkey Creek,

Petitioner,

v.

MICHELL B. DEVILLE and RICKY DEVILLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. PRELIMINARY STATEMENT

Respondent focuses solely on alleged "disputed issues of fact" but fails to address the actual holdings of this Court as to qualified immunity (and in fact, the alleged disputed issues of fact are not "material" to a proper qualified immunity analysis). Respondent does not address the Court's qualified immunity jurisprudence or the basis of probable cause. Given the fact that this Court has recognized that "the risk of harm to both the police and the occupants [of a stopped vehicle] is minimized . . . if the officers routinely exercise *unquestioned command of the situation.*" *Arizona v. Johnson*, __ U.S. __, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009)[emphasis ours], the issue of whether the right allegedly violated was laid out with sufficient specificity by the Courts is of paramount importance. *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Respondent did not have a "clearly established" right delineated with such specificity to deny Chief Marcantel qualified immunity in this case.

II. ARGUMENT AND AUTHORITIES

A. Respondent misapplies this Court's Qualified Immunity and Probable Cause Jurisprudence

1. Qualified Immunity

Respondent mistakenly asserts "that reasonableness query is the crux of the case for all issues presented by Petitioners." (*See* Brief in Opposition at pg. 10). This statement shows Respondent's fundamental misapplication of this Court's qualified immunity

jurisprudence. Even if Petitioner's actions on August 5, 2005 were "objectively unreasonable" (which is completely and utterly denied), in *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) this Court held the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is a distinct inquiry from the merits of the excessive force claim. Has a constitutional right been violated on the facts alleged is a starting point. However, even if a violation could be made out on a favorable view of the parties' submissions (i.e. on the facts as alleged by Respondents), the next step in the analysis for the Court to determine is whether the right was clearly established. There was no Constitutional violation by Chief Marcantel. However, even if there was, it cannot be said the alleged Constitutional violation was clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. Given the jurisprudence and statutes in existence on August 5, 2005, Petitioner reasonably believed he had probable cause to arrest the Respondent and thus to utilize the force he used to effectuate that arrest. Respondent says because Respondent disputes the facts, any action by Petitioner was unreasonable and qualified immunity fails. This is incorrect and misapplies this Court's qualified immunity jurisprudence. This Court has never reached the issue of which type or the *degree* of force a police officer may use to compel a non-compliant suspect out of a vehicle while on a traffic stop pursuant to *Mimms*, or what amount of force a police officer can use to effectuate a

custodial arrest when the suspect refuses to exit the vehicle. It is precisely this type of case for which the Courts created the doctrine of qualified immunity.

2. Probable Cause

Respondent states, "The arguments brought by Petitioner Marcantel as the basis for his writ application discuss only Marcantel's side of the story" (*See* Brief in Opposition at pg. 11). This statement displays a fundamental misunderstanding and misapplication of the standard of probable cause utilized by law enforcement officers in the course of their daily work. Probable cause exists when:

> the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed 1879 (1949). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, *viewed from the standpoint of an objectively reasonable police officer amount to' probable cause.*" *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

In determining the existence vel non of probable cause, the Court is concerned with the "facts and circumstances within the arresting officer's knowledge,

and of which he has reasonably trustworthy information." *State v. Johnson*, 249 La. 950, 192 So.2d 135, 141 (La. 1966), *cert. denied*, 388 U.S. 923, 87 S.Ct. 2144, 18 L.Ed.2d 1374 (1967). It is not particularly significant that the officer received information that was not firsthand; what is important is the nature of the information, whether it was such that "reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 157, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Thus, observations and reports of fellow peace officers engaged in related investigations clearly provide a reliable basis for an arrest. Cf. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

Thus, would an objectively reasonable police officer with the facts as known to Chief Marcantel on August 5, 2006 have believed that Respondent had committed a crime? The answer is clearly — yes. The Fifth Circuit found that Marcantel reasonably relied on information provided to him by Tarver. (*See* Appendix "A" to Petition at pg. 15a). This finding, coupled with the observations of Chief Marcantel at the scene were "facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar*, 338 U.S. at 175-176. The facts and circumstances as Chief Marcantel perceived them are the crux of the probable cause determination and for all of Chief Marcantel's actions taken thereunder. It does not matter what Petitioner alleges occurred — that is not the probable cause standard. What the officer perceived is all important to

the analysis. Chief Marcantel only needed ". . . a reasonable ground for belief of guilt." *Maryland v. Pringle*, 540 U.S. at 371. Respondents offer no credible argument Chief Marcantel did not have probable cause, other than "his writ application discusses only Marcantel's side of the story." (*See* Brief in Opposition at pg. 11). Petitioner correctly focuses on the facts as perceived by Chief Marcantel. As show above, this is not a credible argument against probable cause. Since Chief Marcantel had probable cause to arrest Respondent on August 5, 2005, Chief Marcantel was objectively reasonable and did not violate any clearly established right of Respondent.

B. Additionally or in the alternative, at the time this detention and arrest occurred, Respondent could not forcibly resist an unlawful detention under State Law

On August 5, 2005, the date of the incident at issue, Louisiana jurisprudence specifically precluded the right of a citizen to resist a detention that was not lawful. *See State of Louisiana v. Sims*, 2002-2208 (La. 6/27/03) 851 So.2d 1039, 1047. Even if the detention of Respondent by Officer Tarver was illegal, as Respondent alleges and the Fifth Circuit incorrectly held, Respondent still had no legal right to resist that detention. *Id.* The Court in *Sims, supra* recognized the long standing doctrine of an individual's lawful right to resist an unlawful arrest. *Id.* at 1045. Respondent could not lawfully resist her detainment by Officer Tarver, notwithstanding the fact the initial detainment was lawful. It must be pointed out to the Court that the Louisiana Legislature overruled *Sims, supra.* in 2006,

a year after the incident at issue. *See State v. Manual*, 2006-0486 (La. App. 4th Cir. 11/21/06), 946 So.2d 245, and 2006 La. Sess. Law Serv. Act 132 (Amending and reenacting La. R.S. 14:108 — Resisting and Officer). Nevertheless, at the time of this incident, Respondent did not have the right to resist her detention in Louisiana. The Fifth Circuit was incorrect when it found ". . . any resistance by Deville was lawful. . . ." (*See* Appendix to Petition at pg. 11a). On August 5, 2006, once Respondent was detained, she could not lawfully resist the detainment in Louisiana. She only had the right to resist an unlawful arrest. Since Chief Marcantel and Officer Tarver had probable cause (albeit developed independently and on different facts), Respondent could not afford herself of the right of resistance to an unlawful arrest, either. The jurisprudence in force on the day of the incident at issue shows the right allegedly violated was not ". . . defined at the appropriate level of specificity . . ." *Wilson v. Layne*, 526 U.S. at 615. Thus, the Fifth Circuit was incorrect when it held Petitioner violated a clearly established right. The Writ Petition should be granted.

C. The Fifth Circuit Decision impermissibly overrules *Mimms*

This Court in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), held that the police have the authority under the Fourth Amendment to order the driver out of a vehicle during the course of a lawful detention for a traffic violation. The Louisiana Supreme Court in *State v. Benoit*, 2001-2712 (La.5/14/02), 817 So.2d 11, 15, has adopted *Mimms, supra.*

Respondent alleges that since none of the facts regarding the reason for the stop in *Mimms* were in dispute, Petitioner cannot rely on *Mimms*, and that the Fifth Circuit decision is not in conflict. Respondent forgets that officer Tarver had radar evidence of a violation of speed which justified his stop which he reported to Chief Marcantel. *Mimms* provided a bright line rule which allows an officer to compel a driver out of a vehicle on a lawful traffic stop. This bright line rule was based in large part on officer safety. For thirty-three years, law enforcement officers have been taught that they can compel a driver out of the vehicle when on a traffic stop. The officer safety issue becomes a moot protection if the police can not use force to extract a non-compliant driver. Despite what Respondent says, the Fifth Circuit's ruling, in essence, has impermissibly overruled *Mimms* and its progeny. Tarver utilized his radar gun to establish Respondent was speeding. This alone provides probable cause, and reasonable suspicion, that a crime or an offense was being or had been committed. It does not matter what Respondent says, the probable cause and reasonable suspicion determination is based on the *officer's perception of the facts*. *Maryland v. Pringle*, 540 U.S. at 371. Respondent's proper course of action was to contest the offense in a court of law, not on the side of the road!

The law of the Fifth Circuit has now overruled this Honorable Court in *Mimms* and now allows a driver who has been pulled over for a traffic violation to sit in the car and say "I did not do it, you have no probable cause or reasonable suspicion to do anything — and if you do — you have violated my clearly established right." Taking Respondent's argument to its logical conclusion

would justify driving off or physical resistance. It is important to remember the Chief was injured in this case by Mrs. Deville throwing a phone at him. The right to compel a suspect out of a vehicle on a traffic stop does not exist without the corresponding right to use force to compel compliance. In this matter, once Chief Marcantel developed reasonable suspicion, he could lawfully force Respondent from the vehicle. The fact Chief Marcantel had probable cause for an arrest gave him authority to break the window as well. Jurisprudential consistency and effective law enforcement application of this Court's criminal procedure warrant a grant of *certiorari*.

III. CONCLUSION

Given the qualified immunity and probable cause jurisprudence of this Court, *certiorari* review should be granted. The clear disregard for qualified immunity and probable cause jurisprudence by the Fifth Circuit cries out for correction. Additionally, law enforcement officials who face this type of situation across the nation on a daily basis need this Court's guidance on these fundamental issues of criminal procedure, public policy, and officer safety.

Respectfully submitted,

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